COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0810-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL BICKLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MARIANNE E. BECKER and ROGER P. MURPHY, Judges. *Affirmed.*

NETTESHEIM, J. A jury found Paul Bickler guilty of battery and disorderly conduct contrary to §§ 940.19(1) and 947.01, STATS. Bickler appeals from the ensuing judgment of conviction and from an order denying postconviction relief. Judge Marianne Becker presided at Bickler's trial and entered the judgment of conviction. Judge Roger Murphy presided at

Bickler's postconviction proceedings and entered the order denying postconviction relief.

Bickler raises three appellate issues: (1) the jury's guilty verdicts are not supported by the evidence, (2) Judge Murphy erred when he ruled that Bickler's postconviction motion for sentence modification was untimely, and (3) Judge Becker erred in the exercise of her discretion by imposing excessive sentences. We reject each of Bickler's arguments. Accordingly, we affirm the judgment and the order denying postconviction relief.

FACTS

On September 11, 1994, at approximately 3:18 a.m., Bickler's wife, Doreen, arrived at the City of Waukesha Police Department and spoke with Officer Cindy Zsohar. Zsohar noted that there appeared to be dried blood in the area of Doreen's nose and mouth. In a signed and written statement, Doreen indicated that when she returned home at approximately 2:30 a.m. that morning, she and Bickler had an argument. When Doreen attempted to leave the apartment, Bickler grabbed her arm, pulled her back and began hitting her in the head and face. Doreen stated that she was frightened of Bickler.

The following afternoon Doreen returned to the police department offering a different version of the event. While she confirmed that she and Bickler had argued, she now stated that her injuries resulted when she attempted to throw a picture at Bickler, lost her balance and fell backwards down a flight of stairs hitting her head on a door and her nose on a wooden trunk at the bottom of the stairs. Doreen stated that when Bickler asked her to leave, she went to the police department because she was upset.

Based on Doreen's original version of the event, the State charged Bickler with causing bodily harm to Doreen, without her consent, in violation of § 940.19(1), STATS., and disorderly conduct in violation of § 947.01, STATS. Bickler was also charged as a habitual offender on both counts. The matter proceeded to a jury trial. Before the jury, Doreen again recanted her original statement given to Zsohar, testifying that Bickler had not battered her. Nonetheless, the jury found Bickler guilty on both counts.

After finding that Bickler was a repeat offender, Judge Becker sentenced Bickler to two consecutive three-year terms of imprisonment. However, Judge Becker stayed both sentences and placed Bickler on probation for three years. On the battery conviction, Bickler was ordered to serve one year in the Waukesha County Jail with Huber privileges as a condition of probation. On the disorderly conduct conviction, Bickler was ordered to serve an additional year in the county jail as a condition of probation; however, this latter confinement condition was stayed.

On January 26, 1996, Bickler filed a Notice of Intent to Pursue Postconviction Relief. However, Bickler did not file his motion for sentence modification pursuant to RULE 809.30, STATS., until November 7, 1996, nearly ten months after his sentencing. In his motion, Bickler contended that Judge Becker's sentence was excessive. The motion was heard by Judge Murphy. At the hearing on the motion, the State argued that Bickler's motion was untimely. In a written decision, Judge Murphy agreed. However, Judge Murphy also addressed Bickler's modification request on its merits, concluding that the sentence, although not "articulately pronounced," was not excessive. Bickler appeals.

DISCUSSION

Sufficiency of the Evidence

When a defendant challenges the sufficiency of the evidence, this court must determine whether the evidence, viewed in the light most favorable to the state, is so insufficient in probative value and force that as a matter of law no reasonable jury could have found guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id***. at 507, 451 N.W.2d at 758.

Bickler argues that the evidence presented at trial, viewed in the light most favorable to the State, did not support a finding of guilt. We disagree. The jury heard testimony from Zsohar about Doreen's written statement. Zsohar testified that Doreen made the statement, read the statement, made changes to it and signed it. Zsohar testified that Doreen "had blood all over her face and was crying." In the statement, Doreen stated her injuries occurred while arguing with Bickler, during which "[Bickler] hit her several times around the head and face." The jury heard testimony regarding prior incidents of battery and disorderly conduct involving Bickler. One of these episodes involved Bickler and Doreen.

The jury also heard Doreen's recantation testimony. Doreen testified several times that Bickler had not hit her and that she was not frightened of him. She explained that on the day of the incident she was recovering from a broken jaw which she suffered when a horse had kicked her and that Bickler would not have hit her knowing that she had a broken jaw. Doreen confirmed the second statement given to the police in which she indicated that her injuries

resulted from a fall down the stairs during which she hit her head and nose on a cedar trunk next to the door at the bottom of the steps. Doreen believed she lost her balance at the top of the stairs because she was intoxicated. Although Doreen admitted to providing Zsohar with the initial signed statement, she attributed that statement to her intoxication. However, Zsohar testified that Doreen did not appear intoxicated when she arrived at the police department.

Following testimony from Zsohar and Doreen, the State presented testimony from an expert witness in domestic violence. The expert explained to the jury that "[t]he battered woman's syndrome" is a "syndrome of self blame for abuse." The witness explained that such women often minimize or deny the abuse which can lead to a recantation. The expert explained a victim might recant as a result of fear of being battered again, losing her loved one, or losing financial support. The expert also explained the "cycle of violence" involved in abusive relationships and that Doreen's behavior, based on the police reports, was consistent with the behavior of a domestic violence victim.

After the State rested, Doreen testified again, this time for the defense. Her testimony was aimed principally at rebutting the domestic violence "power and control" testimony presented by the State's expert. Doreen specifically denied that Bickler exercised control over her in the form of economics, coercion, threats, intimidation and isolation. Doreen also denied that minimizing and denying were elements of her relationship with Bickler.

Bickler argues that this evidence, viewed in the light most favorable to the State, does not support the jury's guilty verdicts. Bickler contends that "[t]he prosecution relied solely upon the testimony of Officer Zsohar, who could only testify about what she observed and the statement given by an admittingly

[sic] intoxicated individual, and an unsworn written statement that was entirely refuted by Doreen Bickler under oath." Essentially, Bickler is urging this court to determine that Doreen's testimony was more credible than that offered by Zsohar. However, Bickler's argument overlooks that "[i]t is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *See* ***id***. at 506, 451 N.W.2d at 757.

In light of its verdict, the jury found Zsohar's testimony to be more credible. We will not disturb the jury's credibility assessment on appeal. Moreover, although Zsohar's testimony was critical to the State's case, the jury's verdict does not rest solely on that evidence. The jury also heard the expert witness's testimony and the other acts evidence. We reject Bickler's argument that the evidence presented did not provide a sufficient basis for a finding of guilt.

Timeliness of Postconviction Motion

To obtain review of a sentence as a matter of right, the defendant must move for sentence modification. *See* ***State v. Chambers***, 173 Wis.2d 237, 261, 496 N.W.2d 191, 200 (Ct. App. 1992). Bickler filed such a motion. However, Judge Murphy ruled that the motion was not timely. Bickler challenges this ruling. This issue requires us to apply the relevant statutes to the procedural facts of this case. That exercise presents a question of law which we review independent of the trial court. *See* ***State v. Tobey***, 200 Wis.2d 781, 784, 548 N.W.2d 95, 96 (Ct. App. 1996). Nonetheless, we value a trial court's ruling on a question of law. *See* ***Scheunemann v. City of West Bend***, 179 Wis.2d 469, 475-76, 507 N.W.2d 163, 165 (Ct. App. 1993). This is so whether we agree or disagree with the court's holding.

Bickler has been convicted of misdemeanors. RULE 809.40, STATS., governing misdemeanor appeals, states that the procedures in felony appeals under RULES 809.30 to 809.32, STATS., also apply in misdemeanor appeals.[1] RULE 809.30(1)(a) states, "'Post-conviction relief' means, in a felony or misdemeanor case, an appeal or a motion for postconviction relief other than a motion under s. 973.19 or 974.06." RULE 809.30(2) sets forth the timeline for appeals or postconviction motions:

> (a) A defendant seeking postconviction relief … shall comply with this section. Counsel representing the defendant at sentencing shall continue representation by filing a notice under par. (b) if the defendant desires to pursue postconviction relief unless sooner discharged by the defendant or by the trial court.
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> (b) Within 20 days of the date of sentencing, the defendant shall file in the trial court and serve on the district attorney a notice of intent to pursue postconviction relief.

Within thirty days after filing the notice of intent, the defendant must order a transcript of the reporter's notes. *See* RULE 809.30(2)(e) & (f).[2] The defendant then has sixty days after service of the transcript to file the notice of appeal or postconviction motion. *See* RULE 809.30(2)(h).

Here, Bickler was sentenced on January 26, 1996, at which time he properly filed a Notice of Intent to Pursue Postconviction Relief pursuant to RULE 809.30(2)(b), STATS. However, the record does not reveal any request by Bickler for the transcripts within the thirty-day deadline prescribed by RULE 809.30(2)(e)

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[1] RULE 809.40 and 809.30(1)(a), STATS., have been amended by 1995 Wis. Act 77, §§ 608 and 604, respectively. The changes do not affect our analysis.

[2] RULE 809.30(2)(e), STATS., applies when the defendant is represented by the public defender. Subsection (f) of the statute applies when the defendant is not represented by the public defender. *See* RULE 809.30(2)(f).

or (f). In fact, as Judge Murphy aptly noted, the record is barren of any such request, timely or not. Thus, Bickler's postconviction motion, which was not filed until November 7, 1996, nearly ten months after his sentencing, was clearly untimely.

Bickler explains that as of the postconviction motion hearing he had not received all of the transcripts he ordered and thus the "time deadline had not expired." But as we have noted, the record does not reveal any such request. We are not questioning Bickler's contention that transcripts were ordered. We are simply observing that this event was not memorialized in the record. Without including that information in the record, Bickler operated at his own peril.

Even though the record in this case does not reveal any request by Bickler for transcripts, we acknowledge that the record does reveal the filing of transcripts in May, July and on August 26, 1996. Therefore, even if Bickler ordered the transcripts, his November 7 motion came after the sixty-day deadline for the filing of such a motion following receipt of the last transcript. *See* RULE 809.30(2)(h), STATS.

We also consider the effect of § 973.19, STATS., on this issue. This statute addresses motions to modify a sentence. At subsec. (1)(a), the statute provides that if transcripts have not been ordered, the defendant must file the modification within ninety days of the sentence. *See* § 973.19(1)(a). Thus, if Bickler did not order transcripts, his motion came far too late under this subsection. At subsec. (1)(b), the statute provides that if transcripts have been ordered, then the time limit of RULE 809.30(2)(h), STATS., applies. *See* § 973.19(1)(b). As we have noted, this provision requires the defendant to file the

motion within sixty days of service of the transcript. And, as we have already held, Bickler also failed to meet this deadline.

Under any of these scenarios, Bickler's motion was untimely. We affirm Judge Murphy's order dismissing Bickler's motion.

The Sentencing on its Merits

Even though ruling that Bickler's sentence modification motion was untimely, Judge Murphy alternatively addressed the motion on the merits. We will do likewise.

Bickler argues that the sentences imposed by Judge Becker was excessive in violation of the Eighth Amendment of the United States Constitution and, as such, reflected an erroneous exercise of discretion. We disagree. In reviewing whether a sentence is cruel and unusual, this court must determine "whether the sentence is so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Hermann***, 164 Wis.2d 269, 282, 474 N.W.2d 906, 911 (Ct. App. 1991). A trial court's sentencing decision is discretionary. *See* ***State v. Macemon***, 113 Wis.2d 662, 667, 335 N.W.2d 402, 405 (1983). However, in determining the proper sentence for a defendant, the court must consider the relevant sentencing factors which include the gravity of the offense, the protection of the public, the rehabilitative needs of the defendant, and the interests of deterrence. *See* ***State v. Sarabia***, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). Here, the record reflects that the court considered each of these factors.

First, Judge Becker observed that the gravity of the offense was "compounded by all the other times … [Bickler] demonstrated, violence in this

community." The record reflects that Bickler had five prior convictions in the past five years for either battery or disorderly conduct. For the first three of these offenses Bickler received probation with various injunctions prohibiting contact with the victims of these offenses and alcohol and drug abuse treatment. For the last two offenses, Bickler was sentenced to prison time which was stayed and conditioned upon compliance with anger management programs, self-help programs and AODA treatment. Bickler's most recent offense, prior to the one at issue in this case, involved a verbal altercation with Doreen for which he was convicted of disorderly conduct as a habitual offender.

As to character, Judge Becker noted that Bickler had demonstrated an absolute lack of control and had caused irreparable injury. The court stated its belief that Bickler's "personality has not developed on all phases on an adult basis." Judge Becker determined that Bickler's unpredictable behavior and a prior physical attack against a stranger indicated a need to protect the public. Based on the above factors, for the battery conviction, Judge Becker sentenced Bickler to three years in prison, stayed, and three years probation with the first year to be served as condition time in the Waukesha County Jail with Huber privileges. For the disorderly conduct as a habitual offender, Bickler received three years in prison, stayed, with one year of condition time to be stayed if he complied with the terms of the condition imposed on the battery charge.

Bickler has a long history of battery and disorderly conduct. His behavior has not been altered by his previous convictions and resulting treatment. The record reflects a proper consideration of the sentencing factors and reasoning underlying the sentences imposed. Judge Becker's sentences were not excessive. If anything, they could be labeled lenient. We conclude that Judge Becker

properly exercised her discretion in sentencing Bickler and that Judge Murphy properly upheld the sentences on postconviction review.

CONCLUSION

We conclude that the evidence reveals a sufficient basis upon which a reasonable jury could find Bickler guilty of battery and disorderly conduct. We further conclude that Judge Murphy did not err in denying Bickler's motion for postconviction relief as untimely. Finally, we conclude that the sentences imposed by Judge Becker, and as confirmed by Judge Murphy, reflect an appropriate exercise of discretion and were not unduly harsh or excessive. Accordingly, we affirm the judgment of conviction and the postconviction order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.